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Nos. 05-7058 and 05-7142

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LORENZO L. JONES,
Petitioner,

v.

BARBARA BOCK, *et al.*,
Respondents.

TIMOTHY WILLIAMS,
Petitioner,

v.

WILLIAM OVERTON, *et al.*,
Respondents.

JOHN H. WALTON,
Petitioner,

v.

BARBARA BOUCHARD, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The court of appeals affirmed the dismissal of petitioners' complaints by applying rules that require prisoners (1) to plead and show, either with specific allegations or documentary evidence, that they exhausted their claims; (2) to have identified in their underlying administrative grievances each individual whom they later sue in federal court, regardless when the prisoner learned that individual's identity or in what capacity (e.g., as a supervisory defendant) the prisoner seeks to sue them; and (3) to ensure that every claim in their complaints is fully exhausted, lest their entire complaints be dismissed despite the presence of exhausted claims. Each of these rules defies the standard norms of federal practice and procedure embodied in the Federal Rules of Civil Procedure that, by the Rules' own terms, apply to prisoner civil rights suits, see Fed. R. Civ. P. 1 (stating that the Federal Rules "govern procedure in all suits of a civil nature"). And while statutes may require what the Federal Rules do not, Congress' enactment of the Prison Litigation Reform Act (PLRA), Pub. L. 104-134, 110 Stat. 1321 (1996), did not mandate the rules applied by the Sixth Circuit in these cases. If the PLRA was intended to mark such a radical change as to how prison civil rights cases would be litigated, one would expect to find a "clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Califano v. Yamasaki*, 482 U.S. 682, 700 (1979). But there is none.

The PLRA's exhaustion requirement is terse, stating only that "[n]o action shall be brought * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). The PLRA's other provisions say nothing about the parties' respective pleading burdens, the quantum or nature of the information that prisoners must include in their administrative grievances, or how a federal court should deal with complaints containing both exhausted and unexhausted claims. To this end, even those courts espousing the rules applied by the Sixth Circuit admit that they have been unable to firmly ground the

rules in the PLRA's text. See, e.g., *Kikumura v. Osagie*, 461 F.3d 1269, 1287 (CA10 2006) (acknowledging that its "total exhaustion" rule was adopted "not because it was dictated by the statutory language, but because 'the policies of the PLRA * * * support'" the rule (quoting *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (CA10 2004))); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1207 (CA10 2003) (acknowledging that the PLRA does not "directly address[]" the parties' respective pleading burdens), cert. denied, 125 S.Ct. 344 (2004); cf. *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001) (offering no textual support for its "name all defendants" rule).

Similarly unable to find direct and meaningful support for the Sixth Circuit's rules in the PLRA's text, respondents defend them by either cobbling together unrelated provisions of the PLRA – themselves unhelpful in justifying the Sixth Circuit's rules – piling inference upon inference based on hyper-technical and flawed readings of the statute's terms or by arguing that the Sixth Circuit's rules are necessary, as a matter of policy, to vindicate Congress' goal of "reduc[ing] the quantity and improv[ing] the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). In doing so, however, respondents ignore the "cardinal canon" of statutory construction, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992), that when a provision is not fairly contained in a statute's language, the Court will not, in pursuit the statute's alleged policy, "engraft" it, *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993); see also Pet. Br. 27-28.

Even when courts give a statute "a nonliteral reading," they will do so only when that reading "is more faithful to the actual intent of the enacting Congress." *Caldwell v. Quarterman*, — S.Ct. —, 2006 WL 2861670, *1 (Oct. 10, 2006) (Stevens, J., respecting denial of cert.) (citing, *inter alia*, *Woodford v. Ngo*, 126 S.Ct. 2378 (2006)). But neither the PLRA's exhaustion provision nor the PLRA as a whole evidences any intention to create the rules applied by the Sixth Circuit here, and

respondents do not seriously contend that the Sixth Circuit's rules are supported by the PLRA's legislative history.[1]

While it is clear that Congress sought to "reduce the quantity and improve the quality of prisoner suits," *Porter*, 534 U.S. at 525, it is also clear that Congress was not willing to enact "whatever furthered" those objectives, *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (because "no legislation pursues its purposes at all costs," "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."); see also *ibid.* ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."). Had that been the sole purpose of the statute, Congress could simply have barred all prisoner litigation from the federal courts (leaving state courts as the only forum for prisoners), or imposed its own procedural traps, such as the three rules created by the Sixth Circuit and applied to petitioners' cases. That was not the sole purpose, however: the backers of the legislation made clear that they wanted to reduce prisoner lawsuits but to do so in a way that did not "prevent inmates from raising legitimate claims. * * * [T]his legislation will not prevent those claims from being raised." 141 Cong. Rec. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

A fair description of the legislative compromise embodied in the statute would have to recognize that it was important to Congress not to go too far, and that the statutory purpose was "to reduce the volume and improve the quality of inmate litigation while not preventing inmates from pursuing legitimate claims." The three rules at issue here, which fall equally on meritorious and non-meritorious claims and work

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[1] To the extent respondents do so contend, those arguments are simply recycled editions of their policy arguments masquerading as legislative history arguments.

synergistically to trap and punish prisoners by dismissing their entire complaints if they offend any one rule, may serve the purpose of reducing the volume of inmate litigation. But they do little – if anything – to improve the quality of inmate litigation and would clearly have been contrary to the purpose of preserving legitimate claims – particularly, given their pernicious interaction. See ACLU Br. 35-37.

Recognizing that Congress likely had other preexisting exhaustion regimes in mind when it enacted the PLRA, this Court has sensibly looked first to administrative law and secondarily to habeas law for guidance in interpreting the PLRA's exhaustion requirement.[2] Critically, however, none of the Sixth Circuit's rules at issue in these cases are reflective of common practice in administrative or habeas law. Absent any indication that Congress intended PLRA exhaustion to carry with it such novel corollaries, it is not surprising that each of them has been rejected by the majority of the courts of appeals to have considered them and that, in the seven months since this Court granted certiorari, even the Sixth Circuit has candidly questioned one[3] and expressly disavowed another.[4]

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[2] The Court recently said that "[i]t is unrealistic * * * to infer from the wording of the PLRA['s exhaustion] provision that Congress framed and adopted that provision with habeas law and not administrative law in mind. Indeed, the wording of the PLRA provision is strikingly similar to our description of the doctrine of administrative exhaustion." *Ngo*, 126 S.Ct. at 2392. On the other hand, it said that "[e]xhaustion is an important doctrine in both administrative and habeas law, and we therefore look to those bodies of law for guidance." *Id.* at 2384.

[3] In *Owens v. Keeling*, the Sixth Circuit acknowledged that this Court's "recent reiteration, in the context of a § 1983 *prisoner* claim, that '[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts,' again calls into question our PLRA exhaustion-pleading requirements." 461 F.3d 763, 768 n.1 (CA6 2006) (quoting *Hill v. McDonough*, 126 S.Ct. 2096, 2103 (2006), and discussing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002)).

I. THE SIXTH CIRCUIT'S "PLEAD AND SHOW EXHAUSTION" RULE IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND FINDS NO SUPPORT IN THE PLRA'S TEXT OR STRUCTURE OR SETTLED PRINCIPLES OF ADMINISTRATIVE AND HABEAS LAW

In both administrative law and habeas law, non-exhaustion is an affirmative defense to be pleaded and established by the defense. E.g., *Day v. McDonough*, 126 S.Ct. 1675, 1678, 1682 (2006) (habeas); *Felder v. Casey* 487 U.S. 131, 157 (1988) (administrative law); see also Pet. Br. 34-36. Respondents offer no principled reason why exhaustion under the PLRA should be any different.

Respondents argue that the PLRA itself not only shifted the burden of alleging exhaustion to PLRA plaintiffs but also that it created the additional heightened pleading requirement applied by the Sixth Circuit in petitioner Jones' case. See generally Resp. Br. 30-44. Critically, however, neither the PLRA nor its legislative history says anything about pleading exhaustion – much less, pleading it with specificity, as respondents concede. So constrained, respondents argue instead that heightened pleading is "inherent in the statute." Resp. Br. 34. Respondents are mistaken.

The PLRA's exhaustion provision states simply that "[n]o action shall be brought * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). That

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[4] As petitioners noted in their opening brief (at 7-8 n.2), in *Spencer v. Bouchard*, 449 F.3d 721, 726 (CA6 2006); see also *Owens*, 461 F.3d at 768; *Bell v. Konteh*, 450 F.3d 651, 654 n.5 (CA6 2006), the Sixth Circuit recently acknowledged the faulty underpinnings of and refused to follow the total exhaustion holding of *Jones-Bey v. Johnson*, 407 F.3d 801 (CA6 2005), pet. for cert. pending, No. 05-874 (filed Jan. 9, 2006).

language implies nothing about the burden of pleading. The "no action shall be brought" language of § 1997e(a) is typical of statutes of limitation. See, e.g., *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 416 (1998) ("[M]ost statutes of limitation provide either that 'all actions * * * shall be brought within' or 'no action * * * shall be brought more than' so many years after 'the cause thereof accrued.'"). Statutes of limitation are expressly an affirmative defense under Federal Rule of Civil Procedure 8(c), and this Court has likened non-exhaustion to the statute of limitation defense for pleading purposes, see *Day*, 126 S.Ct. at 1678, 1682 (describing "exhaustion of state remedies" in the habeas context as an affirmative defense and likening it to "the statute of limitations defense"). In light of this Court's repeated holdings that non-exhaustion is an affirmative defense in analogous regimes and this Court's recognition that the non-exhaustion and the statutes of limitation defenses operate similarly, there is no basis to view PLRA exhaustion any differently absent a clear statement by Congress to that effect.

Respondents assert that the Sixth Circuit's heightened pleading requirement "effectuates the PLRA's screening requirement," Resp. Br. 34, and that "courts would be prevented from efficaciously screening" without it,[5] *id.* at 22. Neither

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[5] As a practical matter, this is just not the case. No court within the overwhelming majority of circuits that treat PLRA exhaustion as an affirmative defense, see Pet. Br. 36 n.14 (collecting cases), has complained that it cannot screen cases effectively under Federal Rule of Civil Procedure 8(a)'s notice pleading standard, and respondents cite no evidence of a lack of effective screening in those courts.

Similarly misplaced is respondents' argument that courts should not "have to sort through each allegation of each complaint to determine which claims are exhausted and which are unexhausted." Resp. Br. 27. If exhaustion is an affirmative defense, courts will only have to "sort through" those allegations for which prison officials present a plausible claim of non-exhaustion. More generally, respondents essentially argue that adjudicators should not have to be bothered with adjudicating. Judicial resources may be scarce, but

assertion is correct. The PLRA contains three provisions that allow district courts to screen and dismiss a prisoner's claim that "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A; see also 28 U.S.C. 1915(e)(2); 42 U.S.C. 1997e(c)(1) & (2).[6] The PLRA also contains a provision that allows defendants to "waive the right to reply to any action brought by a prisoner." 42 U.S.C. 1997e(g)(1). Under this provision, a district court may require the defendants to reply to the prisoner's suit "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits." *Id.* § 1997e(g)(2). According to respondents, treating non-exhaustion as an affirmative defense "proves too much" because, unless a prisoner pleads and shows exhaustion,

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> when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

[6] Section 1915A requires screening of a prisoner's complaint "before docketing, if feasible or, in any event as soon as practicable after docketing." 28 U.S.C. 1915A(a). Section 1915(e)(2) allows screening "at any time" and also allows dismissal, notwithstanding the substance of a prisoner's claims, if the prisoner is proceeding *in forma pauperis* and his or her "allegation of poverty is untrue." 28 U.S.C. 1915(e)(2). Section 1997e(c) allows dismissal "on [the court's] own motion or on the motion of a party." 42 U.S.C. 1997e(c)(1). For purposes of judicial screening, these provisions are meaningfully indistinguishable; they all allow a district court, whenever it desires, to dismiss a prisoner's claims that are defective for any of the above-enumerated reasons.

courts following the PLRA's screening provisions and § 1997e(g) cannot determine whether the prisoner has "stated a claim on which relief may be granted" or "has a reasonable opportunity to prevail on the merits." Resp. Br. 17-22, 43. There are a number of critical flaws in respondents' reasoning.

First, the relationship Respondents posit between the exhaustion requirement of § 1997e(a) and the PLRA screening provisions does not exist. Respondents' expansive reading of the screening provisions conflates their requirement that courts screen-off and dismiss those claims that "fail[] to state a claim upon which relief may be granted," 28 U.S.C. 1915A(a); see also 28 U.S.C. 1915(e)(2); 42 U.S.C. 1997e(c), or reveal that a prisoner does not have "a reasonable opportunity to prevail on the merits," 42 U.S.C. 1997e(g), with a prisoner's duty to exhaust. But Congress did not say that. It could have easily done so by adding "or is unexhausted" to the end of these provisions' lists of bases for sua sponte dismissal. See Pet. Br. 39-41 (textual analysis demonstrating that Congress did not intend "failure to state a claim [to] include[] failure to exhaust"). But it did not. Indeed, *all* it said about exhaustion is that claims may be dismissed at screening without *requiring* exhaustion. 42 U.S.C. 1997e(c)(2). The presence of that statement makes the absence of exhaustion from the mandatory screening criteria that much more telling.

Second and relatedly, were this Court to embrace respondents' expansive reading of "fail to state a claim" and "reasonable opportunity to prevail on the merits," the PLRA's screening provisions and § 1997e(g) would swallow every claim in which a prisoner plaintiff does not affirmatively disprove in their complaint every possibly relevant affirmative defense. See Fed. R. Civ. P. 8(c) (enumerating nineteen specific affirmative defenses and requiring defendants to assert in their answer "any other matter constituting an avoidance or affirmative defense"). Without a clear statement from Congress, such an inversion of standard litigation practice and the specific terms of Federal Rule of Civil Procedure 9

(requiring plaintiffs to plead certain matters with specificity, but not including exhaustion – much less, PLRA exhaustion – among them) is simply too much to draw from the simple command of the PLRA's screening provisions and § 1997e(g) that district courts determine whether a prisoner has "failed to state a claim on which relief may be granted" or whether there is "a reasonable opportunity to prevail on the merits."[7]

Third, respondents' argument presumes that all unexhausted claims "fail to state a claim" or are incapable of providing a prisoner "a reasonable opportunity to prevail on the merits."

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[7] With respect to § 1997e(g) specifically, the lower courts have sensibly treated § 1997e(g) as summarizing the screening criteria set out at length in other sections and have directed defendants to reply to a complaint when it passes the initial screening prescribed by 28 U.S.C. § 1915(e)(2) and its companion screening provisions and is found to state a claim, not to be frivolous or malicious, and not to seek damages against an immune defendant. See, *e.g.*, *Childerson v. Illinois Dept. of Corrections*, No. 04-652-JPG, 2006 WL 2644941, *5 (S.D. Ill. Sep. 14, 2006) ("Defendants are ORDERED to timely file an appropriate responsive pleading to the complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g)."); *Benavides v. Cambe*, No. 3:06-CV-522 RL, 2006 WL 2583705, *1 (N.D. Ind. Sep. 6, 2006) ("For the reasons set forth below, the Court * * * ORDERS, pursuant to 42 U.S.C. § 1997e(g)(2), that the Defendant respond to the complaint as provided for in the Federal Rules of Civil Procedure."); *Brown v. Williams*, No. 1:06-CV-0058-TCM, 2006 WL 1722274, *2 (E.D. Mo. June 20, 2006) ("Plaintiff's allegations * * * survive review under § 1915(e)(2)(B) and should not be dismissed at this time. See 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(g)(2). Therefore, the Court will order that defendants * * * respond to the amended complaint."); *Bowers v. County of Schuyler*, No. 06-CV-6081L(P), 2006 WL 1650695, *2 (W.D.N.Y. June 5, 2006) ("IT HEREBY IS ORDERED, that plaintiff's request to proceed in forma pauperis is granted; * * * FURTHER, that pursuant to 42 U.S.C. § 1997e(g)(2), the defendants are directed to answer the complaint."); *Richardson v. Ortiz*, No. CIV S-05-2316 FCD CMK P, 2006 WL 2015513, *2 (E.D. Cal. July 17, 2006) ("If the allegations of the complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits of this action."). The PLRA's screening provisions themselves do not make exhaustion a pleading requirement, and § 1997e(g) adds nothing to respondents' argument.

Not so. It is certainly true that after this Court's decision in *Ngo*, most unexhausted claims will not return to federal court because they will have been procedurally defaulted on timeliness grounds. But it is not the case that all unexhausted claims will be incapable of post-dismissal resuscitation. There remain some jurisdictions with sufficiently long grievance deadlines that a prisoner may be able to return to the grievance system, exhaust his or her remedies, and later return to federal court to present his potentially meritorious claim. See, e.g., North Carolina Dep't of Corr., *Rules and Policies Inmate Booklet*, § 20(6)(a) (Mar. 2002), *available at* http://www.doc.state.nc.us/Publications/inmate%20rule%20book.pdf (one-year grievance deadline); see also Pet. Br. 76-77 n.29. Even prisoners in jurisdictions with shorter deadlines may be able to resuscitate their unexhausted claims if their prison grievance administrators exercise discretion to entertain the untimely grievance. See Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L.J. 1771, 1810 & n. 192 (2003) (observing that most grievance systems give administrators discretion to hear procedurally noncompliant grievances); see also Brief of the States of New York et al. as Amici Curiae in Support of the Petitioners at 6 n.4, *Woodford v. Ngo*, 126 S.Ct. 2378 (No. 05-416), *available at* 2005 WL 3598179 ("Some prison grievance procedures provide that prison officials may excuse untimely filings under defined circumstances."); Pet. Br. 76-77 n.29. Even more importantly, the PLRA "implicitly incorporates" a number of "well established exceptions to exhaustion." *Ngo*, 126 S.Ct. at 2393 (Breyer, J., concurring); see also Pet. Br. 62-63 n.24. Equating non-exhaustion with "failure to state a claim" or "no reasonable opportunity to prevail on the merits" at the judicial screening stage would preclude a federal court from ever entertaining a prisoner's assertion that he or she justifiably failed to exhaust. See, e.g., *Kaba v. Stepp*, 458 F.3d 678, 685-87 (CA7 2006) (holding that evidence of assaults and threats raised a factual question whether administrative remedies were actually available to a particular prisoner); *Giano v. Goord*, 380 F.3d 670, 678-79

(CA2 2004) (holding the failure to use the correct administrative remedy was justified by a lack of clarity in the rules governing prison remedies).

Equally misguided is respondents' reliance on qualified immunity. Respondents assert that the PLRA's screening provisions "are analogous to the law of qualified immunity" because, like the PLRA's requirement that prisoners have a "reasonable opportunity to prevail on the merits" before a court may order defendants to reply to a prisoner's complaint, qualified immunity "affords defendants 'an entitlement not to stand trial or face the other burdens of litigation.'" Resp. Br. 42 (quoting *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)). But this Court has never wavered from its holding that qualified immunity is an affirmative defense to be pleaded and proven by the defense. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding that qualified immunity is one of Rule 8(c)'s "any other matter[s] constituting an avoidance or affirmative defense"); see also Pet. Br. 37. Thus qualified immunity refutes, rather than supports, respondents' argument that PLRA exhaustion must be pled by plaintiffs.

Respondents fare no better in relying on habeas rules of exhaustion pleading. They argue that the heightened pleading and judicial screening requirements embodied in the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) indicate that, "in order to screen cases under the PLRA, it too requires heightened pleading." Resp. Br. 42; see also *id.* at 51. But the Habeas Rules prove just the opposite. Under the Habeas Rules, as respondents acknowledge, district courts "must promptly examine" habeas petitions and dismiss them sua sponte without ordering a responsive pleading "if it plainly appears * * * that the petitioner is not entitled to relief." Habeas Rule 4; see also *Day*, 126 S.Ct. at 1683 (discussing Rule); *Felix v. Mayle*, 125 S.Ct. 2562, 2570 (2005) (same). Rule 2(c) requires habeas petitioners to "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." This Court has

recognized that Rule 2(c)'s pleading requirement, like the requirement urged by respondents, is "more demanding" than Federal Rule of Civil Procedure 8's notice pleading standard. *Mayle*, 125 S.Ct. at 2570. Notwithstanding habeas' screening provision and express heightened pleading requirement, this Court has consistently characterized exhaustion as an affirmative defense in the habeas context, see *Day*, 126 S.Ct. at 1678, 1682; *Granberry v. Greer*, 481 U.S. 129, 132 n.5 (1987) ("[T]he answer to a habeas petition shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state." (quotation omitted)). Accordingly, even if the PLRA contained an express heightened pleading requirement like that in habeas – and it does not – importation of habeas rules into the PLRA regime would not include exhaustion among those matters subject to any heightened pleading requirement.

Even if PLRA plaintiffs were required to plead exhaustion, nothing in the PLRA requires them to plead it with specificity or demonstrate it with complaint attachments in the manner required by the Sixth Circuit. As explained in petitioners' brief, this Court rejected an invitation – just like respondents' – to impose a pleading requirement more demanding that Rule 8(a)'s notice pleading standard in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). There, the defendants argued that the requirements of a statutory scheme (in that case, Title VII) would be best served ("effectuated," in respondents' terms) by a pleading rule that requires more than Rule 8(a) does. The Court rejected that argument and properly recognized that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[8] *Id.* at 515 (quoting

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[8] The Court's recent decision in *Hill v. McDonough*, 126 S.Ct. 2096 (2006), further evidences the Court's reluctance to impose heightened pleading requirements absent the clearest of congressional mandates. In *Hill*, also a § 1983 prisoner case, the Court reiterated that "[s]pecific

Leatherman v. Tarrant County Narcotics Intelligence & Coor. Unit, 507 U.S. 163, 168 (1993)); see also Pet. Br. 41-44. Respondents' claim that heightened pleading of exhaustion is "inherent" in the PLRA is the language of "interpretation" and therefore contrary to *Swierkiewicz*. Their reasoning from the supposed policies of the PLRA no more comprises an amendment of Rule 8(a) than did the *Swierkiewicz* defendants' argument concerning Title VII.

What is more, only four months before enacting the PLRA, the same Congress *did* unequivocally impose a heightened pleading requirement in another statute, the Private Securities Litigation Reform Act (PSLRA), Pub. L. 104-67, 109 Stat. 737 (1995), which shows what Congress does when it does intend to impose such a requirement. In section 101, Congress prescribed heightened pleading requirements for alleging misleading statements and omissions in securities fraud actions, mandating that:

> [T]he complaint shall *specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.*

15 U.S.C. 78u-4(b)(1)(B) (emphasis added). The statute further requires that if a plaintiff seeks to recover money damages based on proof that the defendant "acted with a particular state of mind * * * the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity

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pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Id.* at 2103.

facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2).

These provisions of the PSLRA clearly do amend or supersede Rule 8(a) in the specified class of cases, and they contrast sharply with Congress's silence in the PLRA concerning pleading of exhaustion.[9] In short, when Congress wants heightened pleading, it knows how to get it, and it failed to do so in the nearly contemporaneous PLRA.

This analysis is consistent with the more general principle that statutory repeals by implication are disfavored and will be found only where congressional intent is clear. See Pet. Br. 49-52. This principle has been applied explicitly to the Federal Rules of Civil Procedure.[10] Thus, in *Califano v. Yamasaki*, 482 U.S. 682 (1979), the Court rejected the argument that claims based on § 205(g) of the Social Security Act were exempted from the terms of Rule 23 of the Federal Rules of Civil Procedure, given Rule 1, which provides that the Rules "govern

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[9] Further, Congress told the courts what to do if the requirement was not met:

> (3) Motion to dismiss; stay of discovery
> (A) Dismissal for failure to meet pleading requirements
> In any private action arising under this chapter, the court shall, on the motion of any defendant, *dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.*

15 U.S.C. 78u-4(c) (emphasis added).

[10] The Federal Rules are treated similarly to statutes for purposes of this sort of analysis. Rules promulgated by the judiciary pursuant to statutory delegation of power are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (referring to Federal Rules of Criminal Procedure); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 66 (1991) (Kennedy, J., dissenting) (applying same principle to Civil Rules).

the procedure in the United States district courts in *all* suits of a civil nature." 482 U.S. at 700 (emphasis in original). Though the government (like respondents here) had a colorable argument based on certain language in the statute, the Court stated: "We do not find in § 205(g) the necessary *clear expression* of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Id.* (emphasis added); *accord*, *Marek v. Chesny*, 473 U.S. 1, 11-12 (1985) ("Nothing revealed in our review of the policies underlying [42 U.S.C.] § 1988 constitutes 'the necessary clear expression of congressional intent' required 'to exempt * * * [the] statute from the operation of' [Fed. R. Civ. P.] 68." (quoting *Califano*, 482 U.S. at 700)); *In re Davis*, 194 F.3d 570, 578, 579 (CA5 1999) ("*Califano v. Yamasaki* illustrates that the Federal Rules of Civil Procedure apply in all suits of a civil nature brought in federal court absent a *direct expression* by Congress of contrary intent * * * Absent a *direct expression* of Congress prohibiting a nondischargeability action by an administratrix, the normal rules of civil procedure, including Rule 17(a), are to be applied." (emphasis added)); *Reid v. White Motor Corp.*, 886 F.2d 1462 (CA6 1989) (applying *Califano* holding to bankruptcy proceeding, holding bankruptcy code's list of situations where proof of claim may be filed on behalf of a creditor was not exclusive and did not preclude claims under Rule 23).

While true that if statutes are in "irreconcilable conflict," the later-enacted governs, Resp. Br. 32 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)), there is no such irreconcilable conflict here. The screening and dismissal provisions of the PLRA can function perfectly well – and do, in the majority of circuits – when the PLRA exhaustion requirement is treated as an affirmative defense and not a pleading – much less, a particularized pleading – requirement. Under that rule, screening operates on the substantive merits of the cases, and the question of exhaustion is left to be raised by the defendants. This result may frustrate respondents' desire for

a greater number of quick dismissals, but it does not conflict irreconcilably with anything that Congress clearly stated.

II. THE SIXTH CIRCUIT'S "IDENTIFY ALL DEFENDANTS" RULE IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND FINDS NO SUPPORT IN THE PLRA'S TEXT OR STRUCTURE OR SETTLED PRINCIPLES OF ADMINISTRATIVE LAW

By freezing the universe of possible defendants at whatever grievance-filing deadline a particular institution employs, the Sixth Circuit's blanket rule that the PLRA's exhaustion provision requires prisoners to have identified in their underlying grievances each individual whom they later sue in federal court marks a radical departure from the Federal Rules' accommodating tradition of free amendments of complaints and permissive joinder to add new parties. See Pet. Br. 56; ACLU Br. 32-33. Like the Sixth Circuit and the one other circuit with this rule – the Eighth Circuit – respondents are unable to identify any textual support for this path-breaking rule. See *Thomas v. Woolum*, 337 F.3d 720, 734, 735 (CA6 2003); *Burton v. Jones*, 321 F.3d 569, 575 (CA6 2003); *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001); *Abdul-Muhammad v. Kempker*, 450 F.3d 350, 351-52 (CA8 2006); *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (CA8 2003).

Instead, they argue, as a matter of policy, that requiring prisoners to identify each defendant "furthers the objectives of increasing the quality and decreasing the quantity of prisoner lawsuits" and "develop[s] the administrative record the PLRA requires." Resp. Br. 44. Merely requiring prisoners to "describe the problem," as petitioners have urged (Pet. Br. 58-59), would, according to respondents, "not develop the administrative record the PLRA requires" because "prison officials would be hard pressed to resolve the problem," thereby rendering the PLRA's exhaustion provision "meaningless" and "toothless" and "effectively turn[ing] the exhaustion

requirement into a 'useless appendage.'" Resp. Br. 44 (quoting *Ngo*, 126 S.Ct. at 2387). Respondents' parade of horribles ignores the well-documented inquisitorial nature of prison grievance proceedings and, in any event, is not implicated by these cases because each petitioner provided sufficient information in their Step I grievances to allow the Michigan Department of Corrections (MDOC) to develop a record, identify the proper individuals responsible for the conduct being grieved, and issue a final decision on the merits without any indication that the grievances were insufficiently specific.

As *amici* have shown, "prison officials do not decide grievances based solely on the characterization of who is responsible for the problem. Grievance policies overwhelmingly provide for investigation of prisoners' complaints." ACLU Br. 12. These investigations allow prison officials to broaden the scope or shift the focus of their inquiries. The MDOC Policy Directive (PD) in place when petitioners' filed their grievances was in accord. The MDOC expressly required at Step I that "[t]he grievant * * * be interviewed," Michigan Dep't of Corr. Policy Directive No. 03.02.130 ¶ (AA) (Nov. 1, 2000),[11] that "[t]he grievant * * * have the opportunity to explain the grievance more completely at the interview," *ibid.*, and "that a thorough investigation of the grievance is completed" *id.* ¶ (Q)(4). At Step II, the MDOC

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[11] The full-text of the PD effective when petitioners participated in the MDOC's grievance system is part of the record on appeal and is reproduced at pages 138 through 157 of the Joint Appendix. For simplicity, we cite to it throughout this brief as "PD00" followed by applicable paragraph, rather than by Joint Appendix page number. We likewise cite to the new PD (effective Dec. 19, 2003), which respondents included as an appendix to their brief, as "PD03" followed by applicable paragraph number.

allowed "further investigation * * * as needed." *Id.* ¶ (S)(4). The MDOC's new PD is also in accord.[12]

Respondents proffer the example of a prisoner whose grievance merely says, "Someone hurt me in my cell." Resp. Br. 44. While certainly preferable for the prisoner to have at least provided the date and time of the incident so prison officials could, learn the identities of the correctional officials on duty, audit any available video footage, or approximate the location of other inmates at the time, that information is not necessary under the inquisitorial model that prison grievance systems follow because prison officials can obtain that information during the prisoner's interview and then investigate and determine whether the prisoner's grievance is meritorious.

The PLRA exhaustion provision requires that a prison has been "afford[ed] * * * time and opportunity to address complaints internally," *Porter*, 534 U.S. at 524-25, and "'correct its own mistakes with respect to the programs it administers before it is haled into court,'" *Ngo*, 126 S.Ct. at 2385 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). So long as a prisoner provides sufficient information to give the prison these opportunities – as all three did – the

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[12] The new PD still requires that prisoners be interviewed, PD03 ¶ (AA) ("The respondent shall interview the grievant."); see also *id.* ¶ (Y) ("[I]f the Grievance Coordinator responds to the merits of the grievance, a grievance interview must be conducted."), and that "[t]he grievant shall have the opportunity to explain the grievance more completely at the interview," *id.* ¶ (AA). These interviews "enable the Step I respondent to gather any additional information needed to respond to the grievance." *Ibid.* And, like the old PD, the new PD requires that the "Step I Grievance Coordinator * * * ensure that a thorough investigation was completed." *Id.* ¶ (CC). At Step II, "[t]he Grievance Coordinator shall ensure that any additional investigation was completed as necessary for each Step II grievance." *Id.* ¶ (GG). The same is true at Step III. *Id.* ¶ (II) ("The Manager of the Prisoner Affairs Section shall ensure that any additional investigation is completed as necessary for each Step III grievance.").

PLRA's exhaustion requirement is satisfied. Cf. *Spruill v. Gillis*, 372 F.3d 218, 234 (CA3 2004) (holding, under its procedural default rule that, "the prison can excuse an inmate's failure to [name someone in his grievance] by identifying the unidentified persons and acknowledging that they were fairly within the compass of the prisoner's grievance."). In contrast,

> [a] rule that penalizes inmates for failing to identify defendants as wrongdoers might undermine these goals by encouraging inmates to list in their grievances anyone who might possibly be involved in the alleged wrongdoing, rather than focusing on the most likely perpetrator or cause of their injury.

Kikumura, 461 F.3d at 1285; see also ACLU Br. 13.

Notwithstanding that Williams and Walton received final decisions on the merits of their grievances, respondents fault Williams for not naming Overton or Pramstaller in his grievances[13] and Walton for naming only Bobo and then suing five other individuals. Resp. 48. But as the record makes clear, Williams did not know Pramstaller's identity when he filed his grievance. Accordingly, when the MDOC denied Williams' Step II grievance appeal and identified Pramstaller as being responsible for denying Williams' surgery request, see JAII 15, Williams objected in his Step III appeal that "Dr. Pramstaller has never conducted personal exam on me," see JAII 14. Overton was the Director of the MDOC at the time that Williams filed his grievance, Resp. Br. ii, and, therefore, not directly involved in the denial of Williams' surgery request or the denial of Williams' requests for a handicapped-accessible cell but potentially liable under § 1983 as a supervisory

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[13] Williams had named all other defendants in his underlying grievances. See JAII 20-21 (Jamrog), 31-33 (Pass), 43-44 (Markwell), 50 (Klee), 54 (Peterson).

defendant. See, *e.g.*, *Williams v. Smith*, 781 F.2d 319, 323-24 (CA2 1986) (articulating standard for satisfying § 1983's personal involvement requirement for supervisory liability).

Walton plainly did not know when he filed his Step I grievance that Gearin was responsible for placing him on indefinite upper-slot restriction, lest he would have named him instead of Bobo. See JAII 65. But the MDOC cured this mistake when itself identified Gearin as being responsible for the grieved conduct. See id. at 66. Every other individual whom Walton sued, except Bouchard, the former warden of Walton's prison, either denied or approved the denial of one of Walton's grievances or grievance appeals. See id. at 66 (Gerth and Bauman), 68 (Bergh). They all, like Overton in Williams' case, were not directly involved in the conduct being grieved, but could be potentially liable as supervisory defendants. Most importantly, at the time Walton filed his Step I grievance, he did not know that it would be denied or who would participate in its denial. Accordingly, neither Williams' nor Walton's case presents the situation respondents posit where the prisoner need only "read a name tag" or "ask a prison official for a staff member's name."[14] Resp. Br. 47.

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[14] Although the "identify all defendants" issue is not implicated by petitioner Jones' case, respondents' reliance on his ability, in response to a district court order requiring him to name the two individuals he sued as "Health Care" Doe defendants, to "promptly" (Resp. Br. 47) marshal the identities of the two individuals – Konkle and Aldabaugh – he identified in his grievance as "Health Care," JAII 1-2, refutes rather than supports respondents' position. While it is unclear when Jones learned these individuals' identities, Jones' substitution of them for the Doe defendants occurred sixteen months after he filed Step I his grievance. Compare JAII 1-2 with JAI 20 n.2. The district court's recognition that Jones could properly substitute defendants whose identities he did not know either at the time he filed his Step I grievance or at the time he filed his complaint was properly and faithfully adherent to the Federal Rules' accommodating tradition of amendment and joinder.

Moreover, under the Sixth Circuit's and respondents' rule,[15] Williams is required to have named Director Overton and Walton to have named Warden Bouchard in their initial grievances – even though neither was directly involved in the grieved conduct – lest they forfeit their rights to sue them as supervisory defendants. For Williams to sue Pramstaller and Walton to sue Gearin, they would be required to file new grievances naming Pramstaller and Gearin specifically, even though the MDOC had already begun investigating Williams' and Walton's grievances, identified the relevant facts, and made the preliminary determinations that the grievances lacked merit.[16] For Walton to sue Gerth, Bauman, and Bergh, he would be required to file a second round of grievances challenging their denial of his first round of grievances.[17] Certainly, Congress, in enacting the PLRA's exhaustion provision, did not intend such absurd results, and this Court will not interpret a statute to produce an absurd result, especially where the plain language, structure, purpose, and history of the

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[15] Respondents assert that the MDOC's new policy "explicitly require[s] prisoners to name in their grievances those they intend to sue." Resp. Br. 15. Not so. The MDOC's new PD provides that "[d]ates, times, places and names of all those *involved* in the issue being grieved are to be included" in the prisoner's grievance. PD03 ¶ (T) (emphasis added). It does not, as respondents suggest, require prisoners to identify individuals in their grievances supervisory officials not directly involved in the issue being grieved or those individuals who may be liable under § 1983 for improperly denying a prisoner's grievance and allowing the grieved constitutional deprivation to continue.

[16] As *amici* demonstrated, it is not at all clear that the MDOC would have even accepted such a grievance. ACLU Br. 11-12 n.9. In any event, "requiring an inmate to file additional grievances concerning essentially the same facts whenever he discovers additional information would harm the efficiency and the finality of the grievance process." *Hooks v. Rich*, No. CV 605-065, 2006 WL 565909, *5 (S.D. Ga. Mar. 7, 2006).

[17] It is not difficult to imagine that the cycle could continue without limit – a sort of "Zeno's Paradox" where final resolution would never be reached.

provision do not support that interpretation. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

In any event, it is precisely because prison grievance systems follow an informal and inquisitorial – rather than adversarial – model that *Sims v. Apfel*, 530 U.S. 103, 111-12 (2000) (holding that "a judicially created" exhaustion requirement more demanding of a claimant than the agency's own regulations is "inappropriate" for informal, non-adversarial administrative proceedings), requires rejection of the Sixth Circuit's holdings that, *as a matter of federal statutory law*, prisoners must have identified all defendants. Although respondents attempt to distinguish *Sims*, those attempts are unavailing.

Respondents' argument that there was no statutory mandate for exhaustion in *Sims* is simply incorrect. (Resp. Br. 50). The Social Security Act provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action" in federal court. 42 U.S.C. 405(g); see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994) ("42 U.S.C. § 405(g) * * * requires exhaustion of administrative remedies before the denial of Social Security disability benefits may be challenged in district court"). Respondents further attempt to distance this case from *Sims* by asserting that "*Sims* turned on the fact that the Appeals Council had primary responsibility for choosing and elaborating on the issues." Resp. Br. 50. Respondents misread *Sims*. *Sims* "turned on" the overall informal and non-adversarial features of the Appeals Council proceedings, 530 U.S. at 111-12 (describing Appeals Council proceedings) – features which, as the above description and *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (describing prison grievance proceedings) make plain, prison grievance proceedings share.

Nor does *Ngo*, as respondents contend, "undercut" *Sims*' applicability. Resp. Br. 50. To the contrary, the two cases can

rest comfortably together, as at least two circuits that have rejected the Sixth Circuit's blanket "identify all defendants" rule have implicitly recognized. *Ngo* requires "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issue on the merits).'" 126 S.Ct. at 2385 (quoting *Pozo v. McCaughtrey*, 286 F.3d 1022, 1024 (CA7), cert. denied, 537 U.S. 949 (2002)). *Sims* guards against courts requiring a claimant to do more than "us[e] all steps that the agency holds out." Both the Seventh and Tenth Circuits have, therefore, appropriately held that

> [w]hen the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in the notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.

Strong v. David, 297 F.3d 646, 650 (CA7 2002) (Easterbrook, J.); accord, *Kikumura*, 461 F.3d at 1283-84 (expressly following *Strong* and citing *Sims*).

III. THE SIXTH CIRCUIT'S "TOTAL EXHAUSTION" RULE IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND FINDS NO SUPPORT IN THE PLRA'S TEXT OR STRUCTURE OR SETTLED PRINCIPLES OF ADMINISTRATIVE AND HABEAS LAW

Standard federal practice dictates that complaints containing "both good and bad claims" are cured by dismissal of "only the bad claims." *Robinson v. Page*, 170 F.3d 747, 748-49 (CA7 1999) (Posner, C.J.); see also Pet. Br. 64. The only statutory language to which respondents and their *amici* suggest is a clear congressional expression of intent to depart from this "fundamental procedural norm," *Robinson*, 170 F.3d at 748, is

the PLRA's use of the words "[n]o action shall be brought," 42 U.S.C. 1997e(a), in its exhaustion provision. Resp. Br. 53-54; States Br. 4. All of their remaining hyper-technical statutory arguments flow from the assumption that, by employing those words, Congress intended to not only make § 1997e(a) a dismissal provision but to mandate the Sixth Circuit's unforgiving "total exhaustion" rule.

But that assumption is fatally flawed. The reading of the word "action" urged by respondents and the States, as Judge Posner wrote in *Robinson*, would produce "a weird result that has no support in the language or purpose of the statute."[18] *Robinson*, 170 F.3d at 748; cf. *Shane v. Fauver*, 213 F.3d 113, 117 (CA3 2000) (Alito, J.) ("[T]he most natural reading of ["action" in] § 1997e(c)(1) is that it simply restates the proposition that is implicit in Rule 12(b)(6), *i.e.*, if a claim is based on facts that provide no basis for granting relief by the court, the *claim* must be dismissed." (emphasis in original)). As petitioners explained in their opening brief, § 1997e(a) establishes only that an action containing both exhausted and unexhausted claims is noncompliant. Pet. Br. 65. It does not direct district courts what to do with a noncompliant complaint.

Throughout numerous other areas of administrative law, courts have repeatedly interpreted mandatory exhaustion

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[18] Admittedly, Judge Posner was interpreting § 1997e(c) – not § 1997e(a). Both provisions, however, employ the "[n]o action shall be brought" language that respondents and the States champion as requiring the Sixth Circuit's "total exhaustion" rule. And the "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning,'" requires that § 1997e(e) be consulted. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). Respondents suggest that no court has ever rejected the argument that § 1997e(e) requires a mixed complaint to be dismissed in its entirety. Resp. Br. 65. Not so. At least one court outside the Seventh Circuit and, therefore, not bound by *Robinson* has done so, see *Libby v. Merrill*, No. Civ. 03-35-B-S, 2003 WL 21756830, *3-*4 (D.Me. Jul. 29, 2003), and petitioners are unaware of any case that has rejected *Robinson*.

provisions, like § 1997e(a), to require dismissal of only unexhausted claims in mixed complaints. See, e.g., *MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1274 & n.13 (CA10 2005) (applying the exhaustion provision of the Americans with Disabilities Act, which states that "[n]o action * * * shall be brought * * * if administrative remedies have not been exhausted," 42 U.S.C. 6104(e)(2), without a total exhaustion rule); see also Pet. Br. 69 n.27 (collecting cases). And this Court has at least once allowed an exhausted claim, despite being bundled with an unexhausted claim, to go forward. See, e.g., *McKart v. United States*, 395 U.S. 185, 192-201 (1969) (allowing challenge to criminal prosecution based on defendant's failure to comply with Selective Service Class IV-A requirements, despite failure to exhaust prior Class I-A designation). To this end, the States' argument that dismissing only unexhausted claims results in a "toothless scheme" means that every other exhaustion scheme in federal jurisprudence is toothless. States Br. 13.

McNeil v. United States, 508 U.S. 106 (1993), and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), relied on by both respondents (at 58-60, 66) and the States (at 5), are not to the contrary. *McNeil* held that a Federal Tort Claims Act (FTCA) suit must be dismissed if the plaintiff exhausted administrative remedies only after filing suit. *McNeil* is irrelevant because there is no indication that *any* part of that case had been timely exhausted, or that the Court would have required dismissal of any timely exhausted claims. In fact, practice under the FTCA is to dismiss only claims that are unexhausted and allow exhausted claims to go forward, e.g., *Palay v. United States*, 349 F.3d 418, 425-27 (CA7 2003) – precisely the holding of the Second Circuit in *Ortiz v. McBride*, 380 F.3d 649 (CA2 2004), cert. denied, 125 S.Ct. 1398 (2005), that petitioners urge this Court to follow. Similarly, in *Hallstrom*, the Court held that the pre-filing notice requirement of the Resource Conservation and Recovery Act of 1976 was mandatory, and a post-filing notice could not prevent dismissal. As in *McNeil*, there was no suggestion that timely notice had

been given as to any claim in the case, and therefore no ruling on the instant question, whether a partially compliant suit must be dismissed in its entirety.

Moreover, as explained above, "most statutes of limitation provide either that 'all actions * * * shall be brought within' or 'no action * * * shall be brought more than' so many years after 'the cause thereof accrued,'" *Beach v. Ocwen Federal Bank*, 523 U.S. at 416, yet neither respondents nor the States cite any case – and petitioners are unaware of any cases – holding that a complaint containing both timely and stale claims must be dismissed in its entirety.

Because § 1997e(a) is unhelpful in elucidating how courts should address mixed PLRA complaints, the PLRA's dismissal provisions, 42 U.S.C. § 1997e(c)(1) and (2), are "the place where we would expect to find guidance as to whether dismissal of 'mixed actions' is required." *Ortiz*, 380 F.3d at 657. But as petitioners demonstrated at length in their opening brief (at 67-69), neither dismissal provision evidences Congress' clear intention to deviate from the "fundamental procedural norm" that "only the bad claims are dismissed." *Robinson*, 170 F.3d at 748-49. Respondents and the States counter that the Sixth Circuit's "total exhaustion" rule "is comfortably included within § 1997(e)(c)'s dismissal provisions" because § 1997e(c)(1) allows dismissal of "frivolous" actions and "a mixed action is legally frivolous." States Br. 6; see also Resp. Br. 62 (describing mixed actions as "failing to state a claim"). Not only is the suggestion that a non-frivolous claim is rendered frivolous or "fails to state a claim" because it is bundled with an unexhausted claim facile bootstrapping, it stretches the established understanding of "frivolous" beyond recognition and ignores that both terms necessarily describe the substantive merits of a claim, which as discussed above, may be meritorious and capable of eventually providing relief even if unexhausted.

Respondents and the States fare no better under habeas law. Although the comity and judicial efficiency considerations are

different in the habeas and civil rights context, see *Ortiz*, 380 F.3d at 660-63, even a wholesale incorporation of habeas exhaustion doctrine into the PLRA would not produce the extreme version of the "total exhaustion" rule urged by respondents and the States.

Habeas petitioners are afforded the opportunity to amend their complaints and go forward with exhausted claims. See *Rose v. Lundy*, 455 U.S. 509, 520 (1982) (a prisoner "can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims."); see also *Rhines v. Weber*, 544 U.S. 269, 279 (2005) ("[I]f a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief."); Randy Hertz & James L. Leibman, *Federal Habeas Corpus Practice & Procedure* § 23.5, at 1108 (5th ed. 2005). By contrast, respondents and the States take the unprecedented view that courts must dismiss an entire case because a single cause of action is unexhausted.[19] To the extent that Congress did intend to impose a "total exhaustion" rule, it could not have had the Sixth Circuit's far more draconian than the pre-existing habeas version in mind.

Nor is the Sixth Circuit's version supported by sound policy. Respondents' and the States' primary policy argument is that the Sixth Circuit's "total exhaustion" rule will create a kind of super-incentive to discourage prisoners from including any unexhausted claims in their complaints. Far from

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[19] Contrary to respondents and the States' argument (Resp. Br. 52; States Br. 15) that a PLRA "total exhaustion" rule will provide the same "a simple and clear instruction to potential litigants" in habeas *Rose*, 455 U.S. at 520, prisoners suing under the PLRA "cannot reliably predict whether courts will find their claims to be exhausted." ACLU Br. 26-27.

"reduc[ing] the quantity and improve[ing] the quality of prisoner suits," *Porter*, 534 U.S. at 528, a "total exhaustion" rule will only encourage prisoners to file each claim separately in order to avoid wholesale dismissal. As Judge McConnell recently wrote for the Tenth Circuit in *Kikumura*, "if we dismissed this action without prejudice, Mr. Kikumura would undoubtedly just drop the unexhausted claim from his complaint and file the action again, creating unnecessary docketing and assignment work for the district court." 461 F.3d at 1288. Because post-*Ngo*, the overwhelming majority of prisoners' unexhausted claims will not be capable of resuscitation, the Sixth Circuit's "total exhaustion" rule will largely result in is waste. That could not be what Congress intended.

CONCLUSION

For the foregoing reasons and those set forth in petitioners' opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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